



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

TIDEWATER REGIONAL OFFICE

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STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO HBKC II, LLC FOR The Matthews Property Unpermitted Discharge

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and HBKC II, LLC, regarding the Matthews Property, for the purpose of resolving certain violations of the State Water Control Law and regulation.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "305(b) report" means the report required by Section 305(b) of the Clean Water Act (33 United States Code § 1315(b)), and Va. Code § 62.1-44.19:5 for providing Congress and the public an accurate and comprehensive assessment of the quality of State surface waters.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

5. "Discharge" means discharge of a pollutant. 9 VAC 25-31-10
6. "Discharge of a pollutant" when used with reference to the requirements of the VPDES permit program means:
 - (a) Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
 - (b) Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.
7. "HBKC" means HBKC II, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. HBKC is a "person" within the meaning of Va. Code § 62.1-44.3.
8. "Lagoon" means a man-made outdoor earthen basin filled with animal waste that undergoes anaerobic respiration as part of a system designed to manage and treat refuse created by animal feeding operations.
9. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
10. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
11. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water... 9 VAC 25-31-10.
12. "Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) an alteration of the physical, chemical, or biological property of state waters or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution but which, in combination with such alteration of or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution." Va. Code § 62.1-44.3.

13. “Property” means the property owned by Ms. Phyllis R. Matthews and located at 3882 Bridge Road in Suffolk, Virginia. The Property is the site of a former hog farm that included a system of four lagoons.
14. “Regulation” means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.*
15. “State Water Control Law” means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.
16. “State waters” means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.
17. “Va. Code” means the Code of Virginia (1950), as amended.
18. “VAC” means the Virginia Administrative Code.
19. “VPDES” means Virginia Pollutant Discharge Elimination System.

SECTION C: Findings of Fact and Conclusions of Law

1. HBKC contracted with a third party excavation company to discharge wastewater from the former hog lagoons to a field adjacent to the lagoons on the Property in accordance with a Virginia Department of Conservation and Recreation (“VA DCR”) Nutrient Management Plan, which was approved by VA DCR on July 17, 2017.
2. The western portion of the Property intersects with Knotts Creek, a tributary of the Nansemond River.
3. Knotts Creek is located in the James River Basin watershed. Knotts Creek is listed in DEQ’s 305(b) report as impaired for shellfish and recreation uses. The causes of impairment are exceedances of Fecal Coliform and Enterococci bacteria.
4. On February 6, 2018, DEQ received a complaint (IR No. 2018-T-1861) concerning the former hog lagoons on the Property. According to the complaint, wastewater from the lagoons was being drained onto the field and discharging into the neighboring waterbody.
5. On February 8, 2018, DEQ inspected the Property in response to the complaint. During the inspection, DEQ observed that wastewater originating from the former hog lagoons was being pumped onto the adjacent field via a three-inch flexible discharge hose. DEQ observed that the discharge was at a rate inconsistent with the VA DCR Nutrient Management Plan due to a missing end cap on the hose such that wastewater was discharging from the Property into Knotts Creek.

6. Upon learning of the non-compliance, HBKC immediately removed the contractor from the Property and hired another company that completed the work in compliance with regulatory requirements.
7. Va. Code § 62.1-44.5 states that: “[E]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances.”
8. The Regulation, at 9 VAC 25-31-50, also states that except in compliance with a VPDES permit, or another permit issued by the Board, it is unlawful to discharge into state waters sewage, industrial wastes or other wastes.
9. Va. Code § 62.1-44.5(B) and 9 VAC 25-31-50(B) require any person who discharges to state waters to notify DEQ within 24 hours of the discovery of the discharge.
10. On May 23, 2018, DEQ issued NOV No. W2018-05-T-001 for the unpermitted discharge of wastewater to state waters. HBKC responded to the NOV on May 31, 2018.
11. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a “certificate” under the statute.
12. The Department has issued no permits or certificates to HBKC.
13. Knotts Creek is a surface water located wholly within the Commonwealth and is a “state water” under State Water Control Law.
14. Based on the results of the February 8, 2018 inspection, the Board concludes that HBKC has violated 9 VAC 25-31-50(A) and (B) and Va. Code § 62.1-44.5(A) and (B), by discharging wastewater to state waters without a permit, as described in paragraphs C(5) through C(8), above.
15. HBKC has submitted documentation that verifies that the violations as described in paragraphs C(5) through C(8), above, have been corrected. On April 21, 2018, HBKC amended and VA DCR approved (on April 25, 2018) a Nutrient Management Plan to allow the application of wastewater to adjacent fields for 2018 in accordance with the application rate specified in the plan. During a follow-up visit on April 24, 2018, DEQ observed that an industrial pump and irrigation broadcaster were being used to apply the wastewater, and that a flow meter monitor and rain gauges were being used to track the application rate.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code § 62.1-44.15, the Board orders HBKC, and HBKC agrees to pay a civil charge of \$8,190 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

HBKC shall include its Federal Employer Identification Number (FEIN) _____ with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, HBKC shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of HBKC for good cause shown by HBKC, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. W2018-05-T-001 dated May 23, 2018. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
1. For purposes of this Order and subsequent actions with respect to this Order only, HBKC admits the jurisdictional allegations, and agrees not to contest, but neither admits nor denies, the findings of fact and conclusions of law in this Order.
3. HBKC consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
4. HBKC declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
5. Failure by HBKC to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the

Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

6. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
7. HBKC shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. HBKC shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. HBKC shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

8. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
9. This Order shall become effective upon execution by both the Director or his designee and HBKC. Nevertheless, HBKC agrees to be bound by any compliance date which precedes the effective date of this Order.
10. This Order shall continue in effect until:
 - a. The Director or his designee terminates the Order after HBKC has completed all of the requirements of the Order;
 - b. HBKC petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

- c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to HBKC.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve HBKC from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

11. Any plans, reports, schedules or specifications attached hereto or submitted by HBKC and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
12. Any documents to be submitted pursuant to this Order shall be submitted by HBKC or an authorized representative of HBKC.
13. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
14. By its signature below, HBKC voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 19 day of November, 20 18.

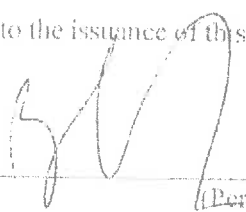


Craig R. Nicol, Regional Director
Department of Environmental Quality

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HBKC II, LLC voluntarily agrees to the issuance of this Order.

Date: 9/10/2018 By: _____


(Person)
HBKC II, LLC

Commonwealth of Virginia

City/County of Chesapeake

The foregoing document was signed and acknowledged before me this 10 day of
September, 2018, by _____ who is
_____ of HBKC II, LLC, on behalf of the company.

Colleen M. McCarthy
Notary Public

358553

Registration No

My commission expires: 4/30/2021

Notary seal:

